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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAULA KING,

Plaintiff and Appellant,

v.

KEVIN KING,

Defendant and Respondent.

G040806

(Super. Ct. No. A246863)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gerald G. Johnston, Judge. Reversed and remanded.

Slovak Baron & Empey and Peter M. Bochnewich for Plaintiff and Appellant.

Freeman, Freeman & Smiley, Gregory M. Bordo and Jared A. Barry for Defendant and Respondent.

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Paula King appeals from the probate court's order determining that her petition for a life estate in particular trust property would violate the trust's no contest clause if she pursued the petition. Her deceased husband, Robert King, set up the trust for Paula and for his adult son, Kevin, Kevin's children, and other beneficiaries, including Paula's grandchildren.¹ Among other provisions, the trust granted Paula a life estate in Robert's community property share of a Palm Desert condominium he owned with Paula (the Encelia Place condo or property). Robert acquired a multimillion dollar home in Palm Desert in early 2006, chiefly with loans against securities he owned as separate property. Later that year, Paula and Robert sold the Encelia Place condo and moved to the new Palm Desert home. Robert died in December 2006.

Paula eventually filed her petition in which she asserted her life estate in Robert's share of the Encelia Place property converted to a life estate in the Palm Desert home. The cotrustees of the trust, in contrast, argued Paula's life estate in the Encelia Place property vanished altogether with the sale of the condominium, totally extinguished by ademption. Paula sought a declaration that pursuing her claim would not amount to a challenge triggering her disinheritance under the trust's no contest terms. Because the terms of the trust unequivocally and indisputably vested Paula with a life estate in the Encelia Place property, we conclude in our de novo review that asking, as Paula does, what became of that life estate interest does not amount to a trust contest. *Whether* the life interest adeemed entirely, became vested in the Palm Desert home, or some other result is a merits determination to be made in further proceedings below. We therefore reverse the probate court's contrary order and remand the matter for that determination.

¹ We use the parties' first names for clarity and ease of reference, and intend no disrespect. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

I

FACTUAL AND PROCEDURAL BACKGROUND

Robert set up his revocable living trust in November 2005. He appointed cotrustees unrelated to Paula, Kevin, or other beneficiaries to administer the trust when he died. The cotrustees submitted a brief opposing Paula's safe harbor petition in the trial court. According to the cotrustees, Robert funded the trust with the following separate property assets: more than \$3 million in cash and securities; the Idaho residence, worth \$2.25 million; a partnership interest worth \$750,000; and personal property valued at \$250,000. Robert also included in the trust his community property share of the Palm Desert condo, which he and Paula acquired together in 2002 for \$205,000. He specified in the trust, in exhibit 1, that this residence was community property.

The terms of the trust benefiting Paula consisted of a "Specific Devise of Real Property and Cash" The devise granted Paula a life estate in the following property to be held in trust for her: "(i) The residential real property commonly known as [address redacted] Aspen Grove Lane, Ketchum, Idaho, (ii) The residential real property commonly known as [address redacted] Encelia Place, Palm Desert, California [the condo], and (iii) the sum of 1 Million Dollars (\$1,000,000)." The trust also included separate bequests of \$100,000 to be held in trust for each of Paula's three grandchildren. Apart from another cash bequest and disposition of tangible personal property, the residuary balance of the estate was to be divided into subtrusts for Robert's son, Kevin, and for Kevin's two children. Robert executed the trust instrument in November 2005.

In February 2006, in his capacity as the sole trustee of his living trust, Robert borrowed approximately \$2 million against his separate property in the trust's cash and securities accounts, and he used the funds to purchase a home for \$2.4 million

on Crosby Lane in Palm Desert (the Crosby Lane home). Neither he nor Paula moved in immediately. Robert put the Idaho residence on the market, but it apparently never sold. In May 2006, Paula and Robert sold their Palm Desert condo for \$335,000, and moved into the Crosby Lane home. Robert died later that year.

The no contest provision in the trust was entitled: “No-Contest Disinheritance Clause.” Among other terms, it stated that, “if Paula King or any person taking through or acting on behalf of Paula King commences any court proceeding or otherwise challenges or attempts to re-characterize Trustor’s characterization as separate property the assets identified on Exhibit 2, then Paula King shall take nothing under this Trust Agreement and shall be deemed to have predeceased the Trustor without issue surviving” Exhibit 2 specified as Robert’s separate personal property approximately \$3.3 million in cash and securities, the \$2.25 million Idaho residence, the \$750,000 partnership interest, and certain personal property items.

The no contest clause stated generally that it forbade “conduct aimed against Trustor’s Estate Plan, the estate of Trustor, the Trust Estate under this Trust, or any assets subject to the Estate Plan of Trustor” As the cotrustees point out, the clause also specifically forbade actions “based on and including, but not limited to, any of the following theories[, as pertinent here]: [¶] . . . [¶] 5. A claim to any property alleged by the [cotrustees] to belong to the [trust] estate; [¶] . . . [¶] 7. Any action or proceeding to determine the character of property,” and conduct that would: “11. In any other way, contest, thwart, or seek to impair any provision of Trustor’s Estate Plan, including provisions in this Trust or any other trust” Paula, for her part, points out the no contest clause also specifically forbade: “9. Any action seeking to invalidate or rescind any lifetime gift made by” Robert in the trust instrument.

According to the cotrustees, they explained to Paula's legal counsel that the Crosby Lane home belonged to the trust because it was not among the specific properties devised to Paula. Consequently, they offered Paula options that included: moving back to the Idaho residence; directing the cotrustees to sell the Idaho residence to obtain funds to purchase a new home; purchasing the Crosby Lane home from the trust for herself; or "to consent to the co[]trustees bringing a petition to reform the Trust by substituting the [Crosby Lane home] for the Idaho Property"

Counsel for the cotrustees acknowledged in a letter to Paula's counsel that the present value of a life estate in Robert's community property half of the Encelia condominium amounted to at least \$84,000. But counsel asserted Paula's life estate in Robert's share of that property was adeemed, i.e., extinguished, by the sale of the property before Robert died. Moreover, counsel for the cotrustees asserted that, even assuming Robert did *not* intend the sale to extinguish Paula's life estate in his interest in the Encelia condo, the cotrustees nevertheless bore no legal obligation to disburse the \$84,000 value of that interest to Paula.

After the parties failed to reach agreement on how to proceed, Paula filed her petition with the probate court under Probate Code section 21320 (all further statutory references are to this code unless otherwise noted). Section 21320 operates as a safe harbor for beneficiaries to obtain a determination whether pursuing the petition would constitute a contest triggering the disinheritance provision of a no contest clause. (See *Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1207-1208; *Estate of Davies* (2005) 127 Cal.App.4th 1164, 1173 (*Davies*).)

Paula's petition asserted she was "entitled to a life estate in certain real property located at [address redacted] Crosby Lane, Palm Desert, California." Paula

phrased the claim as a question, specifically: “‘Where a trustor/testator bequeaths a life estate in certain real property to his wife, but after execution of his will and/or trust, and before death, sells the property and purchases another property in which they both live, does the surviving spouse receive a life estate in the new property?’”

The cotrustees joined Kevin in contending the challenge violated the trust’s no contest clause. According to the cotrustees, “[i]f Paula King were to prevail on her Petition to Determine Entitlement to Trust Distribution (the ‘Underlying Petition’), she would acquire an income interest in 79.58% of all Trust assets . . . as opposed to an income interest in 49.22% of all Trust assets . . . contemplated by the Grantor at the time the Trust was executed. The position advocated by Paula King in the Underlying Petition would have devastating consequences on Kevin King and the other Trust beneficiaries.” The trial court denied Paula’s petition for a safe harbor proceeding to ascertain whether her life interest in the Encelia Place property survived in the Crosby Lane property, and she now appeals.

II

STANDARD OF REVIEW

“Although no contest clauses are valid and favored by the public policies of discouraging litigation and giving effect to the testator’s intent, they are also disfavored by the policy against forfeitures and therefore are strictly construed and may not extend beyond what plainly was the testator’s intent.” (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1128.) “‘Only when an act comes strictly within the express terms of the forfeiture clause may a breach thereof be declared’ [Citation.]” (*Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 255 (*Graham*)). Where, as here, “[t]he parties presented no extrinsic evidence to the trial court to aid in the interpretation of the trust document . . . , we must

deduce the intent of the trustor[] from the face of the document.” (*McIndoe v. Olivos* (2005) 132 Cal.App.4th 483, 487.) In strictly construing a no contest clause, we review the probate court’s ruling de novo. (*Betts v. City Nat. Bank* (2007) 156 Cal.App.4th 222, 231; accord, *Burch v. George* (1994) 7 Cal.4th 246, 254 [appellate court independently construes trust language in appeal from a probate court’s safe harbor ruling].)

III

DISCUSSION

Given the standard of review, we conclude the probate court viewed Paula’s petition too narrowly, rather than strictly construing the no contest clause. True, the clause bars “A claim to any property alleged by the [cotrustees] to *belong* to the [trust] estate” (italics added), and, as we have recently explained, a life estate creates a material beneficial ownership in equitable title that is ““substantially equal to the value of the fee interest,”” at least for tax purposes. (*Phelps v. Orange County Assessment Appeals Bd. No. 1* (May 27, 2009, G040428) ___ Cal.App.4th ___.) An assertion of a life estate is thus a significant claim of ownership.

But we cannot overlook that the terms of the trust granted Paula a life estate in the Encelia Place property. Construed to avoid forfeiture, Paula’s safe harbor petition asked, essentially, “What became of the Encelia Place life estate?” Asking this question does not trigger any express disinheriting term of the no contest clause, as required to declare Paula in breach of the clause. (*Graham, supra*, 37 Cal.App.4th at 255.) To the contrary, the no contest clause manifests an intent to safeguard life estates created under the trust, by forbidding “action seeking to invalidate or rescind any lifetime gift made” in the trust instrument. We do not suggest the cotrustees are in breach of this provision of the no contest clause. Rather, the principle is simply that specific provisions of a writing

control over more general terms (Code Civ. Proc., § 1859) and, to the extent the no contest clause specifically addresses life estates, it protects those — like Paula’s — created under the trust. In short, in our de novo review, we cannot say that the question, “What became of the Encelia Place life estate,” amounts to a contest when the very terms of the trust granted that interest to Paula.

The parties, of course, assert wildly divergent answers concerning the fate of Paula’s life estate in the Encelia Place property. Paula contends it transmuted into the more valuable Crosby Lane property, while the cotrustees assert ademption has rendered it entirely worthless by extinction. (See generally 14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, §§ 253 et seq., pp. 331-332 et seq.) These contentions concerning the merits are, however, beyond the scope of the ruling below or our purview on appeal. Section 21320 provides “a safe harbor for beneficiaries who seek a judicial determination whether a proposed legal challenge would be a contest, *and that is the only issue to be decided when such an application is made.*” (*Davies, supra*, 127 Cal.App.4th at p. 1173, italics added.) “[T]he decision about whether the beneficiary’s proposed action would be a will contest may not involve a determination of the merits of the action itself” (*Ibid.*) Consequently, we express no opinion on the merits, which remain to be resolved below on remand.

IV

DISPOSITION

We reverse the probate court's order determining the petition would constitute a challenge violating the trust's no contest clause and remand for further proceedings consistent with this opinion. Appellant is entitled to her costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.